

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

DISTRIBUTION SPECIALISTS, INC.,

Respondent.

**Docket No. FMCSA-2007-29085¹
(Eastern Service Center)**

ORDER ON BINDING ARBITRATION

On June 1, 2007, the Field Administrator for the Eastern Service Center of the Federal Motor Carrier Safety Administration (FMCSA) (Claimant) issued a Notice of Claim (NOC) against Distribution Specialists, Inc. (Respondent). The NOC, which was based on an April 11, 2007 compliance review, charged Respondent with one violation of 49 CFR 172.800(b), offering or transporting hazardous materials without a security plan, and proposed a civil penalty of \$3,890.

On August 23, 2007, Claimant filed a Motion for Order of Default requesting that I declare the NOC (including the civil penalty) as the final order in the proceeding because Respondent's reply was so deficient as to constitute no reply at all. By Order of May 19, 2010, I denied this request on the ground that although Respondent admitted the violation, its challenge to the civil penalty was precisely what was required for binding arbitration, even though Respondent did not use the words "binding arbitration".

Because FMCSA's Guidance for the Use of Binding Arbitration under the Administrative Dispute Resolution Act of 1996 provides that a case will be submitted for arbitration only if both

¹ The prior case number was VA-2007-0106-US0498.

parties consent, and neither party had consented to the procedure, I deferred action on Claimant's Motion for Order of Default to provide both parties with an opportunity to provide their consent. On June 22, 2010, Claimant submitted both Claimant's and Respondent's consent to binding arbitration. Accordingly, this matter will be referred to binding arbitration.

2. Procedures

The arbitration process will be conducted pursuant to FMCSA's published guidance on this subject.² The parties will work together to select an arbitrator and establish procedures that will govern the binding arbitration. A representative of FMCSA will contact Respondent to answer any questions it may have about the arbitration process, including the choosing of an arbitrator.

a. Options in Choosing the Arbitrator

The parties may choose an arbitrator from the following sources:

1. Civilian Board of Contract Appeals Judges or representatives from other government agencies who have been trained in arbitration;
2. Uncompensated neutral parties from local communities; or
3. Compensated neutral parties from outside the government, whose costs are to be shared by agreement of the parties.

The selected arbitrator will assist the parties in developing procedures and preparing an Arbitration Agreement.

b. Arbitration Format

Respondent may have attorney or non-attorney representation, or it may appear *pro se*, that is, it may represent itself in the arbitration proceedings. With the consent of

² See *Guidance for the Use of Binding Arbitration under the Administrative Dispute Resolution Act of 1996*, Docket No. FMCSA-2003-14794, 69 Fed. Reg. 10288, March 4, 2004.

both parties, the arbitrator may conduct hearings in person or by telephone, video conferencing, or computer.

Each party will present evidence supporting the penalty and terms of payment it considers appropriate. The evidence may not contest whether or not the violation occurred because Respondent has conceded the violations as a condition of arbitration. Neither written submissions nor oral argument may contain any reference to the amount of the civil penalty proposed by the party. At a time specified by the arbitrator, each party will present to the arbitrator and to the opposing party a sealed envelope containing the amount of its total proposed civil penalty and a proposed payment plan. Before opening the envelopes, the arbitrator will determine the appropriate civil penalty and payment plan based upon the evidence presented during the proceeding. The arbitrator will provide his or her determinations in writing to the parties. The arbitrator will then open the envelopes and select the civil penalty and payment plan that is closer to the arbitrator's determinations. The arbitrator has the discretion to select one party's proposed total civil penalty and the other party's proposed payment plan.

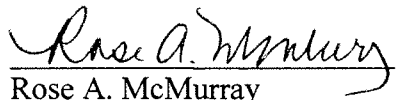
c. Maximum and Minimum Penalty Amounts

The parties may not propose an amount higher than the amount assessed in the NOC. There is a minimum statutory penalty of \$250 for this violation.

d. Limited Appeals

The arbitration award is binding on the parties. Appeals from arbitration awards are generally limited to fraud or misconduct in the proceedings. *See* Federal Arbitration Act, 9 U.S.C. § 10.

It Is So Ordered.



Rose A. McMurray

Assistant Administrator

Federal Motor Carrier Safety Administration

7-30-10

Date

CERTIFICATE OF SERVICE

This is to certify that on this 30 day of July, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Robert Pyle, Vice President
Distribution Specialists, Inc.
43671 Trade Center Place, Suite 110
Sterling, VA 20166

One Copy
U.S. Mail

John C. Bell, Esq.
Trial Attorney
Office of Chief Counsel (MC-CCE)
Federal Motor Carrier Safety Administration
802 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061

One Copy
U.S. Mail

Loretta Bitner, Acting Field Administrator
Federal Motor Carrier Safety Administration
802 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061

One Copy
U.S. Mail

Craig A. Feister
Virginia Division Administrator
Federal Motor Carrier Safety Administration
400 North 8th Street, Suite 780
Richmond, VA 23219-4827

One Copy
U.S. Mail

Docket Operations
U.S. Department of Transportation
1200 New Jersey Avenue SE
Room W12-140
Washington, DC 20590

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